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No. 75-763

In the Supreme Court of the United States

OCTOBER TERM, 1975

RAMIRO ALVARADO AND VALENTINE KALIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners' sole contention is that the trial court violated their Sixth Amendment rights by taking judicial notice of the geographic location and other physical aspects of a border checkpoint which had been established in a prior criminal proceeding.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846. Petitioner Alvarado was sentenced to four years' imprisonment to be followed by a special parole term of two years. Petitioner Kalie was sentenced as a young adult offender with a special parole term of two years. The court of appeals affirmed (Pet. App. A).

The evidence showed that on May 5, 1973, while on duty at the Sarita checkpoint, Border Patrol Agent Richard Powell stopped an automobile occupied by

unindicted co-conspirators Maria Salinas and Froni Miracle (Tr. 130-131, 146).[1] The checkpoint was five miles south of Sarita, Texas (Tr. 130), and 85 miles from the Mexican border on U.S. Highway 77, the most direct route north from the border. See *United States* v. *Merla*, 493 F.2d 910, 911 (C.A. 5); see also p. 3, *infra*.

While questioning the two women about their citizenship, several things aroused agent Powell's suspicion that they were transporting marijuana. First, he noticed the strong scent of strawberries and he knew from experience that strong sprays are often used to hide the scent of marijuana (Tr. 131-132). Additionally, one of the women was wearing a low-cut top and was "display[ing] her feminine charms" by leaning over, a not unusual method used to distract a Border Patrol officer's attention (Tr. 134-135). Finally, when he asked for a key to the trunk of the car, the women told Powell that they did not have a trunk key (Tr. 135).

Sensing "something was up," Powell directed the women to pull over to a secondary inspection point where, upon removing the back seat and searching the car's trunk, he discovered approximately 291 pounds of marijuana (Tr. 135-136, 173).[2]

At trial, Salinas and Miracle testified that petitioner Alvarado offered them $400 to drive a car which would be filled with marijuana 400 miles along the border (Tr.

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[1]"Tr." refers to the transcript of the trial, which was reprinted with its original pagination in brackets as a part of the appendix in the court of appeals.

[2]The search was conducted prior to this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which the Court has held shall be given prospective application only. *United States* v. *Peltier*, 422 U.S. 531. See Pet. App. 3a.

193-194; Pet. App. 3a). Petitioners later went to Salinas' apartment and gave her the keys to Kalie's car which contained the marijuana later discovered by agent Powell (Tr. 118, 195-196, 255-260).

At a pretrial hearing on various preliminary matters, the trial court informed counsel for petitioners (Tr. 38):

> I have, in the past, and I will in this case, take judicial notice of the findings that I made in the case of the [*United States* v. *Jose Ascencion Garcia*, Criminal Action No. 72-C-62], with regard to the location of the Checkpoint, and the judicial notice does not take into account anything that happened with regard to these particular Defendants as they approached the Checkpoint, as they were stopped and what occurred from that time on. The judicial notice will be with regard to the situation surrounding the establishment of the Checkpoint, its location, and things of that nature.

As the court of appeals held (Pet. App. 4a), the district court acted properly:

> Defendants next point contests the trial court's right to take judicial notice of the location, justification, and other physical aspects of the Sarita checkpoint as developed and analyzed by it in a prior criminal proceeding, *U.S.A.* v. *Jose Ascension-Garcia*, Criminal No. 72-C-82 [*sic*]. Again, we find no error. Clearly the trial judge was warranted in taking judicial notice of immutable geographic and physical facts adjudicated in a previous proceeding. *See* Rule 201, Federal Rules of Evidence. Additionally, we see that these same facts have been noted previously by this court in *United States* v. *Merla*, [493 F.2d 910 (C.A. 5)]. This facility of accepting

what was plainly true could not abridge any Sixth Amendment right to confront witnesses.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]Petitioners' reliance (Pet. 8) on *Pointer* v. *Texas*, 380 U.S. 400, and *United States* v. *Clark*, 475 F.2d 240 (C.A. 2), is misplaced. In *Pointer* this Court held that a defendant's Sixth Amendment right to be confronted with the witnesses against him applies to the states, thereby precluding the introduction at trial of a witness' statement at a preliminary hearing where the defendant was not represented by counsel and thus did not have the opportunity to cross-examine the witness effectively. In *Pointer*, the witness was the victim whose testimony had a direct bearing on the defendant's guilt.

In *Clark*, the defendant was entirely excluded from a suppression hearing relating to the drugs he was accused of possessing. Since this proceeding had a direct bearing on the defendant's guilt, the court held that his Sixth Amendment right of confrontation was violated.

Here, in contrast, judicial notice properly was taken of the geographic location and physical aspects of the Sarita checkpoint—matters of common knowledge not pertaining directly to petitioners' guilt or innocence.